

IN THE SUPREME COURT OF THE UNITED STATES

Pages: 1 through 79
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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll

4 hear argument first this morning in

5 Case 16-6795, Ayestas versus Davis.

6 Mr. Kovarsky.

7 ORAL ARGUMENT OF LEE B. KOVARSKY

8 ON BEHALF OF THE PETITIONER

9 MR. KOVARSKY: Mr. Chief

10 Justice, and may it please the Court:

11 18 U.S.C. Section 3599 entitles

12 indigent inmates facing the death

13 penalty to reasonably necessary

14 services. And services are reasonably

15 necessary when they would be used to

16 identify or develop possible claims by

17 a reasonable attorney representing a

18 paying client of ordinary means.

19 But in the Fifth Circuit, the

20 standard is higher. Inmates must show

21 necessity that is not just reasonable

22 but that is substantial. As a result,

23 courts in the Fifth Circuit, and the

24 Fifth Circuit alone, are permitted to

25 probe deeply into the merits and

1 procedural viability of as yet
2 undeveloped claims that the requested
3 services might support.

4 CHIEF JUSTICE ROBERTS: Why
5 would a reasonable attorney with finite
6 means to spend spend them on -- on the
7 research into the facts as -- as you
8 propose, when he won't be able to
9 submit those facts to the court under
10 2254(e)(2)?

11 MR. KOVARSKY: Mr. Chief
12 Justice, I actually think that they may
13 well be able to submit those facts
14 under 2254(e)(2), and I also think that
15 there are reasons why a reasonable
16 attorney might pursue evidence
17 notwithstanding the inability to
18 introduce that evidence at an (e)(2)
19 hearing to prove the under --
20 underlying constitutional violation.

21 CHIEF JUSTICE ROBERTS: Well, if
22 he is ever able to submit under (e)(2),
23 it would be because it's a new rule of
24 constitutional law -- I'm just looking
25 at the statute here -- or a factual

1 predicate that could not have been
2 previously discovered. And if it could
3 not have been previously discovered, it
4 seems to me you won't be able to make a
5 case of ineffective assistance of
6 counsel. It's not ineffective if he
7 couldn't have discovered it.

8 MR. KOVARSKY: Mr. Chief
9 Justice, you're looking at the two
10 subsections under (e)(2).

11 CHIEF JUSTICE ROBERTS: Uh-huh.

12 MR. KOVARSKY: We actually drop
13 out of the (e)(2) analysis because the
14 inmate didn't "fail to develop the
15 claim" within the opening clause. So
16 you -- the Court would never even reach
17 the analysis in the two subsections
18 that you're --

19 CHIEF JUSTICE ROBERTS: Well, I
20 would have thought he did fail to
21 develop it. You just have an excuse, I
22 guess, a reason why he shouldn't be
23 faulted in your view, and that's
24 because of the ineffective assistance
25 of counsel. And you plan to make that

1 case by submitting the new evidence
2 that you want the funds to uncover.
3 And this says that you can't do that.

4 MR. KOVARSKY: I -- we -- he did
5 not fail to develop the evidence in
6 state court. In Williams v. Taylor,
7 the Court said that's not a no fault
8 phrasing, that failed --

9 JUSTICE GINSBURG: This -- this
10 issue was not aired at all below, was
11 it?

12 MR. KOVARSKY: No.

13 CHIEF JUSTICE ROBERTS: So you
14 think it will be available on remand?

15 MR. KOVARSKY: The issue should
16 be available to the Fifth Circuit on
17 remand, although the Fifth Circuit has,
18 you know, encountered this on a number
19 of occasions and has refused to adopt
20 the director's interpretation. In
21 fact, a number of states have pressed
22 the director's interpretation in a
23 number of different courts of appeals,
24 and not a single jurisdiction anywhere
25 adopts it. So the idea of --

1 CHIEF JUSTICE ROBERTS: Is there
2 a Fifth Circuit decision -- you say
3 you've encountered this in the Fifth
4 Circuit. Is there a Fifth Circuit
5 decision that rules on this?

6 MR. KOVARSKY: The Fifth Circuit
7 decision that's most on point is
8 Canales v. Quarterman or Canales v.
9 Thaler. Canales is the first name of
10 the case. And in that case, it says in
11 a footnote the director acts as --
12 tasks us to take the step, and we're
13 not going to do that.

14 CHIEF JUSTICE ROBERTS: It
15 sounds to me like that's -- we're not
16 -- as you suggest we should do here, is
17 you're not going to reach it and make a
18 ruling on it.

19 MR. KOVARSKY: Yes, exactly.

20 CHIEF JUSTICE ROBERTS: You
21 think --

22 MR. KOVARSKY: I don't mean to
23 suggest they've heard the issue and
24 decided that it's not meritorious.
25 It's just that the director has made

1 that case to the Fifth Circuit, and
2 that is not the law in the Fifth
3 Circuit. It's not, you know, the basis
4 of a judgment below. It's not a bar
5 that we'll encounter unless the Fifth
6 Circuit decides to make new law.

7 JUSTICE ALITO: Could I ask you
8 a question about the jurisdictional
9 issue that your adversary has raised?
10 Do you think that appellate courts have
11 jurisdiction over disputes about the
12 amount of funding?

13 MR. KOVARSKY: In certain
14 circumstances, yes.

15 JUSTICE ALITO: And what would
16 those circumstances be?

17 MR. KOVARSKY: If the amount of
18 funding interferes with the
19 representation. So to --

20 JUSTICE ALITO: So any -- any
21 time there's a -- that the attorney is
22 dissatisfied with the amount of
23 funding, I assume, that would mean that
24 there could be an appeal?

25 MR. KOVARSKY: No, Justice

1 Alito. If -- for example, if an
2 attorney comes in after the case is
3 concluded and asks for attorneys fees
4 or something like -- something like
5 that, then maybe there's a discussion
6 to be had about whether that's
7 appealable. But when you're asking for
8 resources in the midst of litigating a
9 case or controversy, that's bound up
10 with the case or controversy. It's an
11 exercise --

12 JUSTICE ALITO: Well, that's --
13 that was the situation I had in mind.
14 So the attorney asks for \$20,000 to
15 investigate and the court grants \$5,000
16 to investigate. There could be an
17 appeal about that?

18 MR. KOVARSKY: Yes. If -- I
19 mean, if the determination is based on
20 an evaluation of reasonable necessity.

21 JUSTICE GINSBURG: I thought the
22 statute said that for any requests
23 exceeding \$7500, there has to be
24 approval of a circuit court judge?

25 MR. KOVARSKY: Justice Ginsburg,

1 for any granted amount over \$7500, then
2 there has to be a finding that those
3 services are not only reasonably
4 necessary but that they are for an
5 unusual character or duration, and then
6 the chief justice -- excuse me -- the
7 chief judge of the Fifth Circuit or his
8 delegee will review the question of
9 whether it's for an unusual character
10 or a duration.

11 The -- what is not -- the
12 reasonable necessity determination is
13 not reviewed by a judge. It's reviewed
14 by a court.

15 JUSTICE ALITO: I mean, wouldn't
16 that --

17 JUSTICE GINSBURG: Here, we're
18 -- we're not talking about how much.
19 We're just talking about whether there
20 is access at all to funds to
21 investigate.

22 MR. KOVARSKY: Yes, I suppose in
23 a situation where an inmate asks for an
24 amount that exceeds \$7500, the question
25 might get presented because the Chief

1 Judge writes it down to \$7500. But
2 that's not this case.

3 The basis of the lower court's
4 decision in this case is just that the
5 funds are not reasonably necessary.
6 The services are not reasonably
7 necessary.

8 JUSTICE ALITO: One other
9 jurisdictional question. Is it true
10 that the director of the Administrative
11 Office of the Courts can under some
12 circumstances review a funding grant,
13 and, if that is so, how can the funding
14 grant be the exercise of judicial
15 power?

16 MR. KOVARSKY: That's not
17 accurate, Justice Alito. The cases
18 that are recited in the Respondent's
19 brief are cases about the AO's
20 authority under the CJA, not under
21 Section 3599. Those are distinct
22 statutes. Of course, the CJA governs
23 in all non-capital cases and 3599
24 governs in capital cases and there's no
25 authority in 3599 for the AO to do

1 that. And you'll notice that all of
2 the cases that are recited in the
3 Respondent's brief are from the 1970s,
4 and that's, of course because none of
5 those scenarios recited there have
6 anything to do with 3599.

7 JUSTICE BREYER: Looking at the
8 cases, my impression was that if, say,
9 the defendant asked for \$15,000 and the
10 Court gave \$10,000 or maybe \$20,000,
11 whatever it is, or one side or the
12 other disagrees with that, they can't
13 appeal. I mean, they can appeal. It's
14 like an administrative law. Of course,
15 they can appeal. You can always
16 appeal. But you're going to lose
17 because the statute is read by various
18 courts, I think correctly, as giving
19 very broad discretion to the trial
20 court to decide how much.

21 It's just like they want to call
22 a witness or something. I mean, you
23 say this witness is irrelevant. Well,
24 the judge says I'm calling him. You
25 can appeal. Ask for mandamus or

1 something. You're going to lose
2 because it's up to the -- it's up to
3 the court. And isn't that the same
4 here and shouldn't it be the same?

5 MR. KOVARSKY: So, first, I
6 don't -- I think it's true that there
7 is -- that the district courts have
8 enormous discretion to determine the
9 award. I don't necessarily know that
10 that means that there wouldn't be
11 jurisdiction.

12 JUSTICE BREYER: It doesn't.
13 I'm saying it doesn't mean that.

14 MR. KOVARSKY: Right.

15 JUSTICE BREYER: It's just like
16 any other situation where a trial court
17 has to run his trial. He has broad
18 discretion over many areas, and that
19 should be the same here.

20 MR. KOVARSKY: Yes. I mean,
21 and, in fact, that's -- these -- these
22 decisions are reviewable for an abuse
23 of discretion. And so there's
24 extraordinary latitude in the district
25 court to make these decisions. So

1 there's no need to, you know, worry
2 about whether there's a jurisdictional
3 basis because oftentimes what the
4 district court does is going to carry
5 the day.

6 JUSTICE SOTOMAYOR: Do you --

7 MR. KOVARSKY: Now, if there are
8 -- I'm sorry.

9 JUSTICE SOTOMAYOR: Do you
10 believe that the statute can be read to
11 mean that a district court, even if it
12 finds reasonable necessity, that it has
13 the authority not to award fees?

14 MR. KOVARSKY: I think there are
15 certainly extenuating circumstances
16 where the statute suggests that could
17 happen.

18 JUSTICE SOTOMAYOR: And what
19 would those be and what if a judge
20 exercises that discretion improperly?

21 MR. KOVARSKY: Okay. So, before
22 I answer that, I just want to make
23 clear that's not the case that we have
24 here. The case that decided here is
25 reasonable necessity.

1 Now, so, for example, if there's
2 some indication of gamesmanship on the
3 part of federal habeas counsel, the
4 resources are reasonably necessary at
5 this point in the litigation because
6 federal habeas counsel has decided not
7 to pursue them on some earlier point
8 when he or she should have.

9 Or, as in -- as is the case in
10 Texas, sometimes if there's a new claim
11 discovered on federal habeas review and
12 the federal habeas lawyer has to take
13 it back to state court, the state court
14 will pay for that litigation, and so
15 the federal habeas -- sometimes the
16 federal courts will say we're not going
17 to write this check until we know
18 whether the state courts are going to
19 write the check. So --

20 JUSTICE KAGAN: The things, the
21 examples that you just gave to
22 Sotomayor, is that why you think the
23 word "may" is in the statute? What is
24 the effect of that word? What does it
25 cover and what discretion does it

1 allow?

2 MR. KOVARSKY: Those are
3 examples -- "may" is basically an
4 escape hatch that allows a court to
5 decline to award services under
6 extenuating circumstances like the
7 circumstances I just described.

8 The other work that "may" does
9 in the statute is affirm that review is
10 for abuse of discretion, because when
11 "may" is added to the statute it's
12 denominated as a technical amendment,
13 which means that it is an amendment
14 designed to conform the statute to what
15 existing practice is.

16 And so the idea is just that
17 what the "may" is doing is clarifying
18 what was already happening in the
19 courts of appeal, which is to say that
20 they review for abuse of discretion.

21 JUSTICE SOTOMAYOR: So you
22 believe it's appealable but under an
23 abuse of discretion standard?

24 MR. KOVARSKY: It's appealable
25 on an abuse of discretion standard, but

1 as long as it's bound up with the case
2 or controversy, as long as it's
3 affecting the quality of the
4 representation, then it's appealable.

5 It's not like an order refusing
6 licensure. It's not like, as mentioned
7 in Respondent's brief, a decision by a
8 judge or justice to hire a clerk.

9 Now maybe the closer question is
10 when an attorney comes in after the
11 case is over on a separate docket
12 number and asks for compensation and a
13 court doesn't want to award that
14 because that decision, the attorney's
15 fee decision after the case is
16 finished, doesn't actually interfere
17 with the representation.

18 So you can make an argument that
19 it's not part of the case or
20 controversy, but as long as the
21 decision under 3599 about resources
22 affects the representation, then it's
23 appealable.

24 JUSTICE GINSBURG: Can we get
25 back to what is the question here? I

1 think you agree that the district
2 court, as you said in your brief, may
3 satisfy itself that a defendant may
4 have a plausible claim or defense
5 before granting the funds.

6 So the -- the plausible claim is
7 -- is a standard that a district court
8 can require counsel to meet?

9 MR. KOVARSKY: This court has
10 used different formulations for
11 referring to the obligations of federal
12 habeas counsel. In *McFarland v. Scott*,
13 it says that the representation is
14 designed to allow counsel to identify
15 and develop possible claims.

16 In *McCleskey v. Zant*, the way
17 it's characterized is all relevant
18 claims. The dissent in *McCleskey* calls
19 it all conceivable claims.

20 I don't necessarily want to get
21 caught up in, you know, is it
22 plausible, is it conceivable, is it
23 relevant. The most on point authority
24 uses the phrase "possible claims" not
25 from *McFarland v. Scott*. The

1 representation has to be capable of
2 allowing trial counsel to perform that
3 function.

4 JUSTICE KAGAN: But what --

5 JUSTICE ALITO: Well, I would
6 think the most relevant language is the
7 language of the statute, reasonably
8 necessary.

9 And I really struggled with
10 that, and also with the phrase
11 "substantial need." But taking
12 reasonably necessary, if it just said
13 necessary, that would be a pretty tough
14 standard.

15 Would you accept the
16 interpretation of reasonably necessary
17 to mean that this is something that a
18 reasonable attorney would think is
19 necessary?

20 MR. KOVARSKY: That -- the
21 reasonable attorney standard and a
22 reasonable attorney representing a
23 client of finite means is the standard
24 that we think is appropriate.

25 And it's actually the way they

1 interpreted the word "necessary."
2 Necessary is the word that appears in
3 the CJA. And they interpret necessary
4 to mean reasonably necessary under the
5 CJA, and every single court of appeals,
6 with the exception of the D.C. Circuit,
7 which does basically the same thing,
8 interprets reasonably necessary to mean
9 a reasonable attorney representing a
10 client of finite means.

11 JUSTICE KAGAN: And the finite
12 means business is just to make sure
13 that, like a reasonable attorney for
14 Bill Gates, would scour the earth and
15 not care about it.

16 MR. KOVARSKY: Exactly. Or, you
17 know, the standard doesn't involve a
18 Richie Rich client or something like
19 that.

20 JUSTICE KAGAN: Uh-huh.

21 JUSTICE ALITO: But the -- but
22 the attorney, the reasonable attorney
23 still has to think that it is
24 necessary, which is pretty tough.

25 MR. KOVARSKY: Well, the

1 standard that Congress --

2 JUSTICE ALITO: What's necessary
3 doesn't mean necessary.

4 MR. KOVARSKY: We assume --

5 JUSTICE ALITO: It's like the
6 necessary and proper clause. It
7 doesn't mean that it's really
8 necessary.

9 (Laughter.)

10 MR. KOVARSKY: Right. We know
11 what Congress was thinking when it used
12 the phrase "reasonably necessary."

13 JUSTICE ALITO: You really know
14 what they were thinking?

15 (Laughter.)

16 MR. KOVARSKY: Well, Congress
17 plucked that phrase directly from the
18 case law that was interpreting the word
19 "necessary" in the CJA. And it is not
20 a particularly close question in the
21 courts of appeal about what the word
22 necessary meant.

23 At the time that Congress wrote
24 the statute, necessary meant reasonably
25 necessary, and reasonably necessary

1 meant the reasonable attorney rule that
2 I described at the top of my opening.

3 JUSTICE ALITO: Okay. What is
4 the difference between "reasonably
5 necessary" and "substantial need"? I
6 have been racking my brain trying to
7 think of something that it is
8 reasonably necessary for me to obtain
9 but as to which I do not have the
10 substantial need.

11 And I can't think of an example.
12 Maybe you can give me an example.

13 MR. KOVARSKY: So, Justice
14 Alito, I'm going to scrap the formal
15 labels for a minute. I'm not going to
16 use substantial need or reasonably
17 necessary.

18 JUSTICE ALITO: No, don't do
19 that, because one is the statutory
20 language and the other is the language
21 that's used by the Fifth Circuit. And
22 that's what we have to deal with, no
23 matter what the various courts of
24 appeals have said about this.

25 MR. KOVARSKY: I'm just trying

1 to answer the question functionally.

2 JUSTICE ALITO: Yeah, okay. All
3 right.

4 MR. KOVARSKY: So, of course, a
5 court can decide a 3599 motion by
6 reference to a merits or procedural
7 issue. It's just that the referenced
8 issue can't be intertwined with the
9 evidence that the inmate is seeking in
10 the motion.

11 So take the following example.
12 A claim has two elements, element A and
13 element B. And the record is fully
14 developed with respect to element A,
15 and the record is not going to get any
16 better with respect to element A. And
17 the inmate comes to court under 3599
18 and asks for resources to develop
19 element B.

20 A court can decide the 3599
21 motion by reference to the merits if
22 what it's doing is saying that your
23 evidence on element A is never going to
24 be good enough and we know that because
25 the record there is fully developed.

1 What the court cannot do and
2 what the Fifth Circuit regularly does
3 under its substantial need rule is say,
4 oh, we're going to guess about what the
5 record on B looks like. We're going to
6 speculate about what you're going to
7 find when you go out and you look for
8 this mitigation evidence or this
9 evidence of materiality, and we're
10 going to -- we're going to guess, based
11 on that estimation, that you're not
12 going to meet that showing on element
13 B.

14 So that's the difference between
15 reasonable necessity, which looks at
16 what a reasonable lawyer would do, and
17 the substantial need rule as
18 operationalized by courts in the Fifth
19 Circuit.

20 JUSTICE KAGAN: If it --

21 CHIEF JUSTICE ROBERTS: But when
22 you're -- but when you're talking about
23 facts -- and this is the point you make
24 in your brief -- how do you know that
25 the record is fully developed under

1 issue A?

2 The lawyer can come in and say,
3 well, if we have another investigator
4 and could look further at this, we're
5 going to develop some more facts. I
6 mean, I'm not sure that that's a valid
7 distinction in your case where it
8 focuses solely on what facts are
9 available.

10 MR. KOVARSKY: There are
11 certainly some cases where an inmate
12 will be requesting funds to develop
13 both prejudice and deficiency, both
14 prong 2 and prong 1.

15 That is not our case. In our
16 case, the record for deficiency is
17 fully developed. And it will often be
18 the case that the record on deficiency
19 is fully developed in the motion
20 because the deficiency is the thing
21 that should be evident from trial
22 counsel's files and all the information
23 that federal habeas counsel has
24 available to her.

25 JUSTICE SOTOMAYOR: Now, do you

1 think that that includes an attorney --
2 that's not the facts of your case. I
3 -- I know that in your case the
4 defendant himself, to the first
5 investigator who interviewed him, said
6 he had had head traumas and -- and some
7 dependency. And by the time the
8 request for investigative services came
9 about, he had already had a
10 schizophrenic episode.

11 But how about a case where
12 there's no evidence whatsoever of
13 dependency and/or of any mental
14 illness, mental challenges, whatever
15 you want to call it? Can an attorney
16 come in and say it is common practice
17 to do this, so I want to do it anyway?
18 Even though there is no suggestion in
19 the record that this is a fruitful
20 inquiry?

21 MR. KOVARSKY: The answer,
22 unfortunately, is it depends. So, in a
23 case like ours where there's also no
24 social history, something that this
25 Court has said has to be performed in

1 absolutely every single case, then,
2 yes, the attorney can come into federal
3 court and say -- without any evidence
4 of red flags, and they can say look,
5 they just don't do a social history,
6 that's a deficiency, and should be able
7 to get funds to look for what the
8 prejudice from that is.

9 Now, there are other cases,
10 however, where counsel -- where trial
11 counsel might have performed a social
12 history, might have done some
13 mitigation. And if trial counsel can't
14 show up and explain what the deficiency
15 is and identify what flags -- red flags
16 the trial counsel didn't follow up on,
17 and can't provide a coherent
18 explanation for why they need resources
19 to go look for those flags, then a
20 trial court would be within its
21 discretion to deny the resources.

22 JUSTICE GORSUCH: I have a
23 separate jurisdictional problem that
24 I'm hoping you can help me with and it
25 concerns the COA requirement. And

1 neither side discusses it, but it's
2 jurisdictional, so I'm -- I feel like I
3 should give you a shot at it and you
4 can help me out with it.

5 The Fifth Circuit didn't require
6 a COA because it read Harbison as
7 saying one wasn't required. But some
8 circuits, including my old one, have
9 distinguished Harbison in similar
10 circumstances, pointing out that
11 Harbison just dealt with the
12 appointment, I believe, of clemency
13 counsel, and the issue wasn't part of
14 the final order in the merits of the
15 habeas petition.

16 Here, the denial of funding was
17 part of the final order in the denial
18 of a habeas petition. And as I read
19 2253, a final order in a habeas
20 proceeding, you need a COA.

21 Now, maybe you can say it's just
22 independent and totally separate from
23 that. But then that might suggest
24 you'd have to -- you'd be able to
25 appeal as a matter of right anytime a

1 funding denial takes place, even before
2 a final judgment.

3 And that seems odd too, though,
4 because funding requests, attorney fee
5 denials, sanctions, usually are wrapped
6 up in and merged with the final
7 judgment. So long-winded question, but
8 it's jurisdictional, so -- and I
9 thought you could help me out with
10 that.

11 MR. KOVARSKY: Sure.

12 So we're appealing the judgment,
13 and the determination on 3599 is part
14 of the judgment.

15 We're not appealing the
16 underlying disposition of the claims
17 because those claims haven't been
18 developed.

19 JUSTICE GORSUCH: Sure. But
20 you're appealing the final order in a
21 habeas proceeding, and that's the
22 language in 2253. So help me out with
23 the language in 2253.

24 MR. KOVARSKY: Well, I take the
25 language -- I'm appealing some -- I'm

1 appealing a determination that was made
2 part of the final order --

3 JUSTICE GORSUCH: Final order?

4 MR. KOVARSKY: -- as well, but
5 I'm not appealing the disposition --

6 JUSTICE GORSUCH: In -- in -- in
7 a habeas proceeding, right?

8 MR. KOVARSKY: It's in a habeas
9 -- it is in a habeas proceeding, but
10 it's also a proceeding under 3599. So
11 -- and there is no COA requirement for
12 that.

13 You know, there are lots of
14 collateral, you know, orders that are
15 issued in habeas proceedings that I --
16 I don't think are subject to COA
17 requirements.

18 JUSTICE GORSUCH: So -- so it's
19 a Cohen issue, you'd say we have
20 collateral -- you know, it's a
21 collateral issue and so we can take it
22 up before a final judgment in -- in the
23 habeas proceeding?

24 MR. KOVARSKY: I'm saying it's a
25 collateral order. I'm not saying it's

1 an exception to the collateral order
2 doctrine in the sense that there's an
3 interlocutory appeal from it.

4 JUSTICE GORSUCH: I've never
5 heard of this animal before. It's
6 collateral, but it still merges to the
7 final order?

8 MR. KOVARSKY: Well, it's -- in
9 the same way that if you denied a
10 hearing without deciding the merits of
11 the claim, I don't necessarily know
12 that that would be subject to the COA
13 requirement.

14 JUSTICE GORSUCH: Well --

15 MR. KOVARSKY: I mean, it's a
16 different --

17 JUSTICE GORSUCH: Deny a hear --
18 evidentiary hearing or a discovery
19 ruling, it all merges into the final
20 order, traditionally. That's my
21 understanding.

22 MR. KOVARSKY: I -- I -- I want
23 to walk back the -- the evidentiary
24 hearing example.

25 JUSTICE GORSUCH: Sure.

1 MR. KOVARSKY: If I deny --

2 JUSTICE GORSUCH: I would too.

3 MR. KOVARSKY: If I deny
4 discovery in a case or I deny something
5 that just prevents the claim from even
6 being presented, the -- the premise
7 behind 2253 is that you can take a
8 rough cut, a first look, at the claim
9 and see if it is -- it has got some
10 merit. And that's why, you know, we
11 have the substantiality requirement and
12 that's why it refers expressly to the
13 merit of the claim.

14 In situations where you're
15 dealing with a procedure that prevents
16 you from even generating that
17 information, the COA requirement
18 doesn't apply. And it's not --

19 JUSTICE BREYER: We don't have
20 to -- do we have to -- I mean, look,
21 suppose it is the case that we're,
22 technically speaking, correctly,
23 listening to what you've done and it is
24 an appeal from a final habeas order.
25 All right.

1 We granted the petition for cert
2 in order to decide whether the circuit
3 is correct in using the words
4 "substantially necessary" instead of
5 "reasonably necessary." Right? Well,
6 there are cases in which we have done
7 just that. We've decided the issue we
8 granted on, and then we've said: And
9 if they needed a COA, this opinion
10 suggests, indeed requires, that they
11 should have granted one. Okay?

12 And then we don't have to deal
13 with that. And if we did that, would
14 that violate something?

15 MR. KOVARSKY: Not to my
16 knowledge.

17 JUSTICE BREYER: And we'll find
18 out if the other side is.

19 JUSTICE GORSUCH: You're okay
20 with that? You're okay with that? You
21 like that proposal -- Justice Breyer's
22 proposal?

23 MR. KOVARSKY: Justice Gorsuch,
24 I do, yes.

25 JUSTICE GORSUCH: Okay. All

1 right.

2 JUSTICE ALITO: Well, picking up
3 on what Justice Breyer just said and
4 trying this one last time, I thought
5 the issue that we had agreed to decide
6 was whether the Fifth Circuit's
7 formulation of "substantial need" is
8 different from "reasonably necessary,"
9 which is the statutory standard.

10 And I still don't understand
11 what the difference is between those
12 two formulations. It seems possibly
13 like just a matter of words.

14 So explain to me what is the
15 difference between those -- those two
16 formulations?

17 MR. KOVARSKY: The reasonable
18 necessity determination starts -- is a
19 construct that starts with thinking
20 about what a reasonable lawyer would
21 do, right?

22 JUSTICE ALITO: Would a
23 reasonable lawyer think it's necessary?

24 MR. KOVARSKY: What a reasonable
25 -- and the -- every evaluation of merit

1 or whether the evidence is helpful for
2 the case starts from the perspective of
3 a reasonable lawyer.

4 JUSTICE ALITO: Right.

5 MR. KOVARSKY: The substantial
6 need test has -- wants nothing to do
7 with that concept.

8 JUSTICE ALITO: Why? I mean, if
9 you have -- if it's a reasonable
10 attorney -- you know, reasonably
11 necessary, would a reasonable attorney
12 think there was a substantial need for
13 it?

14 MR. KOVARSKY: A reasonable
15 attorney would -- when a reasonable
16 attorney thinks there's a substantial
17 need for -- as the Fifth Circuit
18 defines it, then they would, of course,
19 seek the evidence. The problem is that
20 a reasonable attorney will also seek
21 evidence in situations that the Fifth
22 Circuit does not define as a
23 substantial need, such as a situation
24 where it's before -- where it's before
25 the petition has even been filed.

1 JUSTICE ALITO: It -- it just --
2 it seems to me like you're not really
3 arguing the question that we granted.
4 You're -- what you're saying is that if
5 we take a look at everything that the
6 Fifth Circuit's been doing in this area
7 in lots of cases that are not before
8 us, it's not doing the right thing.
9 That seems to be your argument. Not
10 that there really is a difference
11 between these two verbal formulations.

12 MR. KOVARSKY: Justice Alito,
13 I'm going to answer your question and
14 I'd like to reserve the rest of my time
15 for rebuttal.

16 What the Fifth Circuit did in
17 our case that it is not supposed to be
18 able to do is speculate about the
19 record on prejudice, which is the claim
20 of two elements that I, you know, that
21 I discussed. The -- the evidence is
22 developed on element A and they're
23 speculating as to what the record is
24 going to look like on B. And that's
25 what they can't do, because reasonable

1 attorneys don't take a fatalistic view
2 towards evidence they don't understand
3 yet if relief is still available in
4 light of everything else in the case.
5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank
7 you, counsel.

8 Mr. Keller?

9 ORAL ARGUMENT OF SCOTT A. KELLER
10 ON BEHALF OF THE RESPONDENT

11 MR. KELLER: Thank you, Mr.
12 Chief Justice, and may it please the
13 Court:

14 There is no meaningful
15 difference between reasonably necessary
16 and substantial need. But before that
17 a predicate issue. There is no
18 jurisdiction here because CJA funding
19 is an administrative claim for federal
20 money.

21 It is not a claim against the
22 state. It is not a claim against the
23 state for money. There is not concrete
24 adverseness here, and --

25 JUSTICE SOTOMAYOR: So where do

1 you go if a circuit is arbitrarily and
2 capriciously saying, we're not going to
3 give any funds, period. You're going
4 to tell me that won't happen, but
5 during the financial crisis not so long
6 ago, they had a reason, but whether
7 that takes care of your right to
8 counsel and counsel that has the
9 resources to do the work necessary to
10 represent you is a different question,
11 a constitutional question.

12 So what happens in that
13 situation? Where does the defendant
14 go?

15 MR. KELLER: The statutory
16 system that Congress put in place says
17 there's only review when funding has
18 been granted at a level of more than
19 \$7500. And if you're asking is there a
20 private right of action here to go get
21 federal money under the statute, there
22 is nothing in the statute that evinces
23 that. But, regardless, this is a claim
24 for federal money for U.S. Treasury
25 funds.

1 JUSTICE SOTOMAYOR: By the way,
2 in which ways is this outside of the
3 judicial branch? I mean, I understand
4 our prior cases where we were asked to
5 review a claim and it then went to the
6 Secretary of the Treasury, who had
7 absolute discretion to grant the claim
8 or not. That went outside the
9 judiciary.

10 But how does this go outside the
11 judiciary?

12 MR. KELLER: Not everything that
13 a federal district judge is assigned to
14 do is an act of judicial power. We
15 know that from Ferreira, for instance.

16 JUSTICE SOTOMAYOR: Well, we
17 also know that those things don't get
18 records made. But here this is
19 required by statute to be put -- to be
20 made a part of the record.

21 MR. KELLER: For potential
22 concessions. But I think looking at
23 the single circuit judge --

24 JUSTICE SOTOMAYOR: Potential
25 what can put things to be in the

1 record?

2 MR. KELLER: If there are
3 potential concessions made during the
4 ex parte hearing or proceeding that
5 then could be used on the merits, then
6 that would be the reason why.

7 JUSTICE BREYER: All right.
8 Look, the statute says upon a finding
9 that investigative, expert,
10 dah-dah-dah, are reasonably necessary
11 for the representation of the
12 defendant, dah-dah-dah-dah-dah, the
13 Court may authorize the defendant's
14 attorneys to obtain such services. It
15 says the court, the judge, the judge
16 may authorize. All right.

17 They say the judge should
18 authorize, and this is the standard,
19 and you say no, that's not the
20 standard. The standard -- or it's the
21 same, do some other way. But in either
22 case it is a judge who is performing a
23 duty that is imposed upon him by a
24 statute. But why isn't that the end of
25 it?

1 We -- we -- we review matters of
2 appointing attorneys fees and paying
3 for them. There can be all kinds of
4 things that judges are authorized by
5 statute to do as part of their judicial
6 duties.

7 I really don't see -- and the
8 cases that you cite are all cases
9 saying basically that there's a lot of
10 discretion in the judge to decide how
11 much, which I agree with. But this is
12 an unusual jurisdictional argument.

13 MR. KELLER: I'm not sure you
14 can separate the amount of funding,
15 though, from whether an investigator is
16 assigned. Here we're not arguing that
17 counsel or the investigator
18 categorically lacks power under the
19 CJA. Their investigator has started to
20 perform the investigation that they
21 seek to do.

22 This is about a claim for
23 federal funding. And I think the
24 procedure for single circuit judge
25 review --

1 JUSTICE GINSBURG: Is there any
2 administrative review of a no funding
3 decision? No, there isn't. The review
4 concerns the amount of the funds. And
5 here it strikes me that what we're
6 dealing with is a simple question of
7 statutory interpretation, what does 13
8 -- 3599(f) require counsel to show to
9 get funds for investigating the
10 existence of a mitigation case?

11 That sounds to me like a legal
12 question, the kind of question that is
13 fit for a court and not an
14 administrative review.

15 MR. KELLER: But Murray's Lessee
16 says that an inquiry into the existence
17 of facts and the application of them to
18 rules of law is not enough to have an
19 exercise of judicial power. Here this
20 can be revised outside the traditional
21 error.

22 JUSTICE BREYER: I'm not sure
23 that's true, what you say is true. The
24 question is, is the judge performing a
25 judicial duty? And the statute says he

1 is. It's in with other statutes that
2 talk about his judicial duties.

3 And it would seem that making
4 certain that a defendant has an expert,
5 where necessary, is part of an ordinary
6 judicial duty.

7 I mean, can you think of -- if
8 you're -- if Murray's Lessee is the
9 best you can do, at least in my own
10 mind, that's quite a different matter.
11 It was asking judges to award pensions
12 or something like that, I think, but
13 that's -- is there anything else you
14 have here going for you at the moment?

15 MR. KELLER: Well, this -- this
16 --

17 JUSTICE BREYER: Obviously I'm
18 skeptical of your argument, but go
19 ahead.

20 (Laughter.)

21 MR. KELLER: And -- and I'll try
22 to -- to fix that, Justice Breyer.
23 This can be revised outside the
24 traditional judicial hierarchy. The
25 single circuit judge review point is

1 key here.

2 What happens is the district
3 judge sends a memo to the circuit
4 judge. There's no party involvement in
5 any of that review.

6 In no sense is that an adversary
7 proceeding, and yet that's the
8 proceeding that Congress has created.
9 And, indeed, there would be
10 constitutional issues with that
11 proceeding that would --

12 JUSTICE GINSBURG: Is there any
13 instance of such a review, the district
14 judge sends a note where the district
15 judge says circuit judge, I'm giving
16 nothing, not one penny.

17 Is there any such procedure
18 existing? Aren't all the cases cases
19 where the district judge says, circuit
20 judge, I'm giving this much. Do you
21 think it's too much? Do you think it's
22 too little?

23 MR. KELLER: The system that
24 Congress created, they were worried
25 about spending too much money. They

1 did not create a mechanism for review
2 when funds were denied. The Tenth
3 Circuit has said that -- and multiple
4 federal judges have advocated placing
5 these benefits granting duties with
6 officers besides judges. That could
7 not be an exercise of judicial power.

8 If I can turn, though, to the
9 --

10 JUSTICE KAGAN: Well, Mr.
11 Keller, if I can just -- I mean,
12 suppose, this is the kind of language
13 which routinely gives rise to circuit
14 splits, you know, one circuit
15 interprets it one way and a second
16 another way and a third another way,
17 and it can go on and on.

18 And you're essentially saying
19 that we have no way to decide which
20 standard is the standard that Congress
21 meant when it said this. So another
22 circuit tomorrow could say, you know,
23 we're just not giving any funds for any
24 mitigation investigations at all under
25 this standard, and we would be, like,

1 whatever.

2 (Laughter.)

3 MR. KELLER: Whether
4 administrative agencies, though, are
5 using or applying a certain rule of
6 law, though, is not the test for
7 whether there is judicial power. There
8 would be extremely anomalous results
9 here to allow a potential two-track
10 appeal.

11 The Seventh and Eighth Circuits
12 have said you can't take an appeal from
13 that single circuit judge
14 determination. And that's correct.
15 But that would mean that if the
16 district judge denies funding at the
17 outset, you do get to take an appeal of
18 that. But if a circuit judge is
19 revising that certification award, then
20 there would not be an appeal. Also --

21 JUSTICE GINSBURG: Not that
22 award. One case is you don't get
23 funding. That doesn't go to a circuit
24 judge. There is no competing -- there
25 is no two-track anything.

1 If the judge says nothing, I'm
2 not giving you the funds to
3 investigate, the only place that that
4 can go is to a court of appeals.

5 MR. KELLER: That's correct.
6 But whether a district judge is
7 granting or denying funds, Article III
8 judicial power can't turn on that, that
9 all of a sudden it becomes judicial
10 power when the funds are being denied.

11 If I can turn to the question
12 presented in the issue of Section
13 2254(e)(2), it is not going to be
14 reasonably necessary to pursue any
15 evidence outside the state court record
16 of trial counsel's performance because
17 AEDPA in Section 2254(e)(2) is going to
18 bar that evidence.

19 JUSTICE GINSBURG: What about
20 the argument that you forfeited -- you
21 forfeited the AEDPA argument by not
22 urging it in the Fifth Circuit?

23 MR. KELLER: We did not forfeit
24 it. First of all, it answers the
25 question presented. The Fifth Circuit

1 did not err because this goes to
2 whether it's reasonably necessary, and
3 that is an issue that both sides have
4 been joined on throughout.

5 And we can't waive arguments.
6 We can only waive issues.

7 JUSTICE SOTOMAYOR: But, I'm
8 sorry, the Fifth Circuit didn't rely on
9 that ground. Neither have you below.

10 So we reach out to a totally new
11 question in which there's no circuit
12 split and answer that question?

13 MR. KELLER: Well, this Court,
14 of course, could narrow its analysis
15 and not decide that issue. Petitioner
16 has conceded, though, that this point
17 remains open. And it is absolutely
18 necessary to also --

19 JUSTICE SOTOMAYOR: Well, I'm
20 not sure it's open after Martinez and
21 Trevino given the nature of our
22 language in those decisions. But
23 that's a merits issue on the question.
24 But having said that, why do we reach
25 it?

1 MR. KELLER: The reason that you
2 should reach it here is because, in
3 asking can a circuit do a preliminary
4 merits analysis, it has to account for
5 the limits of habeas review.

6 And if it is the case that
7 (e)(2) is going to bar this evidence,
8 and it does, then there's no reason to
9 continue to fund an investigation to
10 raise evidence that cannot possibly be
11 presented to a federal court.

12 JUSTICE SOTOMAYOR: So --

13 JUSTICE BREYER: Maybe, but they
14 may have to go to -- maybe they have to
15 exhaust -- maybe they haven't exhausted
16 on this point. I mean, I don't know.
17 In -- in the first sentence of where
18 the language you're quoting does --
19 it's kind of -- it's an exhaustion
20 requirement. And -- and so they'll go
21 and exhaust.

22 Now, that isn't what we took
23 this case to decide, is what everybody
24 has told you. So proceed if you want
25 on this thing, but at some point, I'd

1 love to hear your point in answer to
2 what he said on -- on the issue we did
3 say we would take.

4 MR. KELLER: Definitely.

5 JUSTICE BREYER: When you want.
6 You don't have to now.

7 MR. KELLER: No, no, that's
8 right. The Court, of course, can in
9 answering the question presented,
10 though, take account of the fact that
11 there are habeas limitations inherent
12 here. Essentially, Petitioner has now
13 conceded that it is permitted to do a
14 preliminary merits analysis in
15 considering 3599(f) funding.

16 Whether you call it a plausible
17 analysis or would a reasonable attorney
18 with finite means spend money on it, a
19 reasonable attorney with finite means
20 is going to look at is this claim
21 barred? Is it speculative? Is the
22 evidence that I would attempt to get
23 into the record, is it duplicative?
24 Those are the three elements of the
25 "substantial need" formulation that the

1 Fifth Circuit is using --

2 CHIEF JUSTICE ROBERTS: I think
3 that --

4 MR. KELLER: -- and that is
5 completely correct.

6 CHIEF JUSTICE ROBERTS: I
7 understand that point, which is -- the
8 end result of which is that it seems to
9 me that you can make all of your
10 arguments under the guise of the test
11 that the Petitioner proposes, which is,
12 of course, the reasonable attorney
13 working with finite resources.

14 I have something of the same
15 problem that Justice Alito has. I -- I
16 don't see that it would be terribly
17 valuable for us to spend the time
18 trying to figure out is reasonable
19 necessary; is that the same as
20 substantial need or not?

21 And even if we come out and say
22 one or the other, I don't know that
23 it's going to get to the heart of the
24 question, which is what is exact --
25 exactly is the district court judge

1 supposed to do or -- so why -- what's
2 wrong with asking when a reasonable
3 attorney working with finite resources
4 would devote resources to that service?

5 MR. KELLER: Mr. Chief Justice,
6 there's nothing wrong with that,
7 provided that the Court does clarify
8 that you could do a preliminary merits
9 analysis, that you can account for the
10 underlying nature of the
11 representation, the limits on habeas.

12 Even the Fourth and Sixth
13 Circuits, which purported to create a
14 circuit split with the Fifth Circuit,
15 analyze is this a substantial question?
16 So the circuits are --

17 JUSTICE GINSBURG: If we said
18 taking account of all the
19 circumstances, would a reasonable
20 attorney ask for funds to investigate?
21 That, you think, would be -- that's the
22 test?

23 MR. KELLER: Provided that there
24 would be an analysis, a preliminary
25 analysis, of the merits that accounts

1 for limitations that AEDPA and other
2 doctrines such as Martinez, if it would
3 apply, actually imposes on the
4 representation.

5 JUSTICE KAGAN: Well, take this
6 case as an example, right? So it seems
7 to me if a judge looks at this case, a
8 judge would say: I -- look, I don't
9 know what you're going to find in your
10 investigation, and it's unreasonable
11 for me to make a judgment about what
12 you're going to find in your
13 investigation because that's the whole
14 point of an investigation. But I do
15 know that here no social history was
16 done at all and you've got like a
17 schizophrenic defendant, somebody who
18 has had a mental health diagnosis of a
19 very serious order.

20 Well, of course, that's the kind
21 of thing that a reasonable attorney
22 would investigate in determining how to
23 spend their limited resources, isn't
24 it?

25 MR. KELLER: Well, and here,

1 counsel wanted to contact the
2 Petitioner's Honduran family members,
3 but Petitioner himself said: Don't do
4 that. Petitioner relented just days
5 before trial.

6 JUSTICE KAGAN: Putting aside
7 whether those particular witnesses and
8 what -- what -- what cross -- whether
9 the -- and maybe just even putting
10 those people aside, I mean, go and
11 figure out whether there's a history of
12 mental health issues.

13 MR. KELLER: Well, in this case,
14 the trial investigator and trial
15 counsel obtained records from the
16 state, all of the mental illness
17 records postdate trial. The
18 schizophrenia diagnosis was not --
19 years after trial.

20 JUSTICE KAGAN: Yes, but I know,
21 you know, if you have a -- a person who
22 has since the incident in question been
23 diagnosed as schizophrenic, you know,
24 some bell goes off that says I think
25 maybe we should do some investigation

1 and try to figure out whether he was
2 suffering from mental health issues at
3 the time of the incident.

4 MR. KELLER: Well, and counsel
5 wanted to contact the family members,
6 and in 1995 Petitioner himself denied
7 having any health problems such as
8 drugs, alcohol or --

9 JUSTICE SOTOMAYOR: Counsel, he
10 did --

11 MR. KELLER: -- mental health
12 issues.

13 JUSTICE KAGAN: I mean, what
14 better purposes would you spend this
15 money on? It seems to me in this case,
16 it's like the only thing you want to
17 spend your money on is a mitigation
18 investigation. There's nothing else,
19 really, to spend your money on.

20 MR. KELLER: Well, and here,
21 funds were approved for the trial
22 investigator to do an investigation, to
23 contact different witnesses. That
24 happened.

25 When Petitioner's counsel and

1 the investigator wanted to contact the
2 family members, who would have been in
3 a position to try to give some
4 indication about social --

5 JUSTICE GINSBURG: But there are
6 many, many sources other than asking
7 family members if you're looking into
8 mental health. There's school records.
9 There's criminal justice records. You
10 don't stop when the family -- the
11 family doesn't want to or he doesn't
12 want his family to be called.

13 MR. KELLER: And counsel did
14 obtain records. This is not a case
15 like Rompilla or Porter, where there is
16 just a file of information sitting
17 there, a treasure trove of information
18 that counsel just had to pick up, or
19 Porter, where there was no attempt
20 whatsoever to go contact potential
21 witnesses. There was no deficient
22 performance here.

23 JUSTICE GINSBURG: What -- what
24 about the -- the specialist at the
25 state habeas -- at the state habeas

1 level? Wasn't there a specialist who
2 said this is what should be done in
3 this case, all of these things should
4 be investigated? And none of them
5 were.

6 MR. KELLER: There was a state
7 habeas investigator report. This is
8 not in the state court record, but this
9 was presented on federal habeas. But
10 even then, there was not particular
11 evidence looking back to say, oh, trial
12 counsel knew this piece of evidence
13 and, therefore, this investigation of
14 it should have done. Rather -- this is
15 JA 266 -- one of the stated purposes of
16 that report was to provide "ammunition"
17 to get funding. And so the purpose of
18 this report --

19 JUSTICE GORSUCH: Counsel, you
20 say there was no deficient performance,
21 but the circuit court had to amend its
22 -- its ruling because it had mistakenly
23 said that there had been an
24 investigation of mental health in 1997
25 by trial counsel, and it had to

1 withdraw that.

2 Is there -- is it fair to say
3 there was no deficient performance or a
4 holding on that score by the Fifth
5 Circuit after -- after it reissued its
6 opinion? Or did it rely solely on
7 prejudice at least with respect to
8 trial counsel?

9 MR. KELLER: It -- it first
10 analyzed the fact -- the answer to the
11 question is the Fifth Circuit opinion
12 can still be read as holding that there
13 was not deficient performance and, in
14 the alternative, that there was no
15 prejudice.

16 JUSTICE GORSUCH: How?

17 MR. KELLER: Because what the
18 Fifth Circuit said was it was proper --
19 or there was no error from not
20 contacting the Honduran family members,
21 one; and, two, the evidence of mental
22 illness postdated --

23 JUSTICE GORSUCH: But that's
24 contacting the family members. And
25 I'll spot you that. But I'm talking

1 about the mental health issue.

2 How can -- how can there have
3 been no deficient performance holding
4 if it withdrew the basis of that
5 holding in its -- in its revised
6 opinion?

7 MR. KELLER: Because, Justice
8 Gorsuch, that was not the only basis
9 for that holding. The Fifth Circuit
10 and the district court also noted that
11 the evidence of mental health issues
12 all postdated trial. And when you're
13 asking was there a deficient
14 performance under Rompilla, you're
15 asking about the quantum of evidence
16 known by trial counsel at the time of
17 trial.

18 JUSTICE SOTOMAYOR: Counsel, how
19 can you justify saying there wasn't
20 deficient trial performance? I mean, I
21 understand all your legal arguments.

22 There were two and a half pages
23 of mitigation evidence. The
24 prosecution gets up and says this is a
25 perfect guy, there's no history of

1 mental health, there's no mitigation on
2 substance abuse. The prosecutor at
3 trial points to the deficits of
4 mitigation investigation that trial
5 counsel has done.

6 We hear from the investigator
7 that he's hired. He's told to
8 investigate. And less than a month
9 before trial, he starts trying to do
10 things and fails completely, as Justice
11 Ginsburg points out, to do even the
12 basics of investigation, trying to get
13 school records, that had nothing to do
14 with not reaching the parents or not;
15 not talking to a witness in California,
16 where this man lived and worked for a
17 long period of time; nowhere in Texas,
18 because he had been there for a period
19 of time.

20 All of those things suggest to
21 me deficient performance. You have a
22 lot of legal defenses, but how can you
23 stand here and say that this kind of
24 investigation meets any constitutional
25 standard?

1 MR. KELLER: Because both
2 counsel and the trial investigator were
3 doing -- this is page 1 and 2 of our
4 brief. The investigator began
5 interviewing Petitioner several times
6 in February 1996, subpoenaed
7 psychological and disciplinary records,
8 made multiple attempts to contact the
9 Honduran family members, contacted
10 several potential witnesses, searched
11 criminal histories and attempted to
12 obtain deportation records and
13 California records. In other words,
14 this is not a situation where Rompilla
15 and Porter, where there was simply no
16 attempt at trying to provide a defense.

17 Rather, the key feature here and
18 what this case had been about up until
19 just recently was the failure to
20 contact the Honduran family members.
21 And that was the gateway through which
22 Petitioner was trying to say that trial
23 counsel could have obtained information
24 that then would have led trial counsel
25 to believe that a mental health or

1 substance abuse investigation should
2 have --

3 JUSTICE BREYER: To go back to
4 what the --

5 CHIEF JUSTICE ROBERTS: Counsel,
6 I can see -- I have a question about
7 how the two parts of the statute
8 worked.

9 The first says reasonably
10 necessary. And then there's the "may"
11 question.

12 Now, it would seem to me, I
13 mean, it can work one of two ways. In
14 other words, the discretion that is
15 granted to the district court could go
16 to the question about whether something
17 is reasonably necessary, the sort of
18 things we have been talking about.

19 I mean, maybe it is necessary if
20 you haven't done anything, but maybe if
21 you're saying, well, I think if I ask
22 the parents a third time, maybe they'd
23 give me a different answer.

24 Or is it necessarily a two-step
25 process where the judge has to make a

1 determination: Is this reasonably
2 necessary, and, if it is, then the
3 district court judge can still deny it
4 because it says "may"?

5 Which of those do you think is
6 how the statute should be read?

7 MR. KELLER: It's the second,
8 Mr. Chief Justice. And we know that --

9 CHIEF JUSTICE ROBERTS: I was
10 hoping you were going to say the first.

11 (Laughter).

12 JUSTICE GINSBURG: On any
13 grounds?

14 CHIEF JUSTICE ROBERTS: Because
15 under the first it does seem to me that
16 all the stuff we've been talking about,
17 you know, did they get the school
18 records or not, did they talk to this
19 person or not, how much did -- it
20 strikes me that those are the sorts of
21 things that would be very hard for a
22 court in the normal -- an appellate
23 court in the normal course to get into.

24 On the other hand, it seems to
25 me there are also things that you could

1 say to the district judge. They do
2 these discretionary rulings all the
3 time. They're much more familiar than
4 we are with how these sorts of
5 mitigation investigations are
6 conducted. So that if the "may" goes
7 into what's reasonably necessary, it
8 seems to me that makes sense.

9 If, however, you say the statute
10 requires an inquiry, is this reasonably
11 necessary, and then the district court
12 has this unusual power to say, even
13 though it meets the statutory standard,
14 I'm not going to do it.

15 MR. KELLER: Well, let me
16 clarify my answer in this way. The
17 "may" language, switching from shall to
18 may doesn't imbue the district court
19 with more discretion, again, assuming
20 that there is jurisdiction.

21 This would be a case sort of
22 like Olano that we cite at page 45 of
23 our brief where there what this court
24 said is a court can analyze, is this a
25 serious issue? And that's very close

1 to what the Fifth Circuit did here in
2 asking is this a substantial -- is
3 there a substantial need, or the Fourth
4 and Sixth Circuits say is this a
5 substantial question?

6 And so those would be proper
7 analyses that a district court could
8 do.

9 And if I could also address
10 Justice Gorsuch's question about
11 certificate of appealability, because I
12 think this dovetails with our
13 jurisdiction argument, our position is
14 that this is an administrative act, it
15 is not a judicial act.

16 But if we're wrong about that,
17 and this is actually an appeal from an
18 exercise of judicial power, then a
19 certificate of appealability should be
20 required because then it is an appeal
21 from the federal habeas judgment.

22 JUSTICE GINSBURG: Again, you
23 are asking us to take up a question in
24 the first instance, which we don't do.
25 There was no discussion of this at all.

1 JUSTICE GORSUCH: Yeah. What do
2 we do about that? On the one hand,
3 it's jurisdictional. On the other
4 hand, it's not in the question
5 presented.

6 So, as Justice Breyer said,
7 maybe we should let the court of
8 appeals deal with that in the first
9 instance.

10 MR. KELLER: Given that it's
11 jurisdictional, the argument would have
12 to be reached. And this is not a
13 situation like Harbison because here it
14 is not simply about a --

15 JUSTICE BREYER: It's
16 jurisdictional, we have to reach it, I
17 think I can find pretty good authority
18 where it came up before and they didn't
19 issue a COA, but we decided the issue
20 and said now you should have issued a
21 COA too. I may be wrong, but you don't
22 have it in your briefs. They don't
23 have it in their briefs. I don't have
24 it in anything I've looked at yet. But
25 I have it somewhere in the back of my

1 mind, which is sometimes wrong.

2 (Laughter.)

3 JUSTICE BREYER: So I'll look it
4 up. Okay. I believe --

5 JUSTICE GORSUCH: That's usually
6 pretty reliable.

7 JUSTICE BREYER: But the
8 question -- this is reminding me of
9 something, if I'm perhaps overly
10 simple-minded on this, but what it
11 reminds me of is the great argument
12 that used to take place in ad law. You
13 see if, in fact, you reverse a fact
14 finding of a district judge, you're
15 supposed to do it if it's clearly
16 erroneous. You reverse a fact finding
17 of an administrative ALJ, you are
18 supposed to do it if there isn't
19 substantial evidence in the record.
20 All right. That's what the statute
21 does.

22 That's -- so Jerome P. Frank,
23 who was a great judge, one day said, my
24 God, I've found it, eureka, I've found
25 a case that a judge wouldn't reverse

1 under the first standard but would --
2 or would reverse under the first
3 standard but wouldn't under the second.

4 But then, when I looked at it
5 more closely, I discovered I didn't
6 have that unusual case anyway.

7 See, he thought there was no
8 difference.

9 That spanned a bunch of law
10 reviews that said, yeah, there is a
11 difference. Some said yes; some said
12 no. So why don't we just say, look,
13 that's what the statute says. Pick up
14 his standard. All these arguments
15 you've been making, maybe good, maybe
16 bad, make them to the district court.
17 Okay?

18 End of case. This circuit, you
19 are to follow the statute. And that's
20 it. Good-bye. And all these other
21 arguments are for the lower court. And
22 if you want, you say that the lower
23 court should take into account all the
24 arguments that it deems relevant and
25 significant. All right?

1 MR. KELLER: And -- and in that
2 narrow ruling, though, it would be very
3 important for the court to clarify a
4 few things and, that is, first of all,
5 a preliminary merits analysis is
6 acceptable, as Petitioner has conceded,
7 and second of all --

8 JUSTICE GINSBURG: Why not just
9 what would a reasonable lawyer do? And
10 if the reasonable lawyer would make a
11 preliminary analysis, fine. But the
12 standard, I thought you agreed, was
13 look at this case, this is a horrendous
14 murder, the only chance in the world
15 that this defendant has is if he can
16 put on a mitigation -- mitigation case
17 and convince one juror he shouldn't get
18 the death penalty. There is nothing
19 else, as Justice Kagan pointed out.

20 MR. KELLER: But in doing a
21 preliminary merits analysis, the second
22 part of that would also be what are the
23 inherent limitations on federal habeas?

24 For instance, if a claim is
25 categorically barred or if the evidence

1 cannot be introduced because 2254(e)(2)
2 bars it, those are all things that an
3 attorney would look at in doing a
4 reasonable, necessary, necessity
5 analysis.

6 JUSTICE SOTOMAYOR: Did we
7 create a meaningless right in
8 Martinez/Trevino? Because that's what
9 you're arguing, which is it's nice to
10 have a hearing and get past the
11 procedural bar, but all of the things
12 that an effective counsel should have
13 done, and we've now found they weren't,
14 no record has been created.
15 Martinez/Trevino, we said that that was
16 the failing that we were remedying, the
17 fact that a defendant has not been
18 given one clear chance to fully develop
19 a record and make his claim.

20 Is that your suggestion?

21 MR. KELLER: No, Martinez will
22 still have force under our argument.

23 JUSTICE SOTOMAYOR: When?

24 MR. KELLER: A failure to
25 challenge evidence, that was Martinez,

1 correcting a jury instruction.

2 JUSTICE SOTOMAYOR: Trevino
3 wasn't an effective assistance of
4 counsel claim.

5 MR. KELLER: Well, and a
6 terrible strategic decision, like Buck
7 versus Davis from last term. All of
8 those are on the state court record.

9 And this court has already held
10 in Holland versus Jackson and in
11 Williams that attorney negligence is
12 chargeable to the client for purposes
13 of 2254(e)(2). That was an
14 interpretation of the statute.

15 JUSTICE SOTOMAYOR: But, isn't
16 Martinez/Trevino suggesting the very
17 essence of the exception to that rule,
18 which is if you've not been given
19 a chance, a fair chance to have some
20 court decide your claim, then you
21 haven't been represented.

22 I don't know what is more
23 attorney abandonment than that.

24 MR. KELLER: Well --

25 JUSTICE SOTOMAYOR: To have one

1 fair chance at having a claim reviewed.

2 MR. KELLER: Martinez said it
3 was creating a narrow exception. It
4 was only over -- it was -- it was
5 clarifying Coleman in that very narrow
6 instance and not --

7 JUSTICE KAGAN: But, Mr. Keller,
8 this is the language that Martinez
9 used. Martinez said that these sorts
10 of claims often require investigative
11 work.

12 It said, I'm quoting again,
13 "they depend on evidence outside the
14 trial record."

15 So the whole exception that
16 Martinez set out, you know, seems to be
17 premised on the idea that there's an
18 opportunity to develop the factual
19 basis for the IAT -- IATC claim.

20 MR. KELLER: Well, nothing in
21 Martinez or Trevino cited to
22 2254(e)(2). And the Court was only
23 considering the narrow procedural
24 default rules created by the Court,
25 but when Congress has spoken --

1 JUSTICE KAGAN: Well, we said
2 all this. It often requires
3 investigative work and it depends on
4 evidence outside the trial record, and
5 now you're saying we'll just take a
6 look at this statute and say that of
7 course it doesn't allow investigative
8 work or evidence outside the trial
9 record. I mean, this is precisely what
10 we said.

11 MR. KELLER: But when Congress
12 has a statute that directs what the
13 rule is for new evidence, and Congress
14 is raising the bar after the Keeney
15 decision, which was the cause and
16 prejudice standard, that what Martinez
17 said was this ought not put a
18 significant strain on state resources,
19 but this would, in fact, provide huge
20 systemic costs on the system if you're
21 going to open up a trial again and take
22 in any new evidence in a claim of trial
23 IAC which could bring in anything into
24 the record. But that's the 2254(e)(2)
25 issue.

1 The point, though, on the
2 question presented is that those type
3 of considerations are absolutely proper
4 for not only the circuit or the
5 district courts to be analyzing but
6 what a reasonable attorney would take
7 account --

8 JUSTICE ALITO: A reasonable
9 attorney with finite means might devote
10 those finite means to an avenue of
11 investigation that has very, very
12 little chance of success because there
13 is so much at stake.

14 So I don't understand how that
15 can be the test here, where the
16 statutory language is reasonably
17 necessary.

18 That seems clearly -- whatever
19 necessary means, it -- it means some
20 degree of importance. It has -- the
21 evidence has to be -- has to meet some
22 level of importance in order for the
23 standard to be met.

24 I don't see how you can get
25 around it. And to say the test is

1 whether -- what would a reasonable
2 attorney with finite means do, I -- it
3 seems to me quite meaningless.

4 MR. KELLER: Well, and that's
5 right, Justice Alito, because we're in
6 a habeas context.

7 JUSTICE ALITO: And I thought
8 you agreed with that standard.

9 MR. KELLER: Well, because we're
10 in a habeas context, the reasonable
11 necessity analysis has to account for
12 the limits on habeas review.
13 Petitioners relied on many non-habeas
14 cases.

15 And what a counsel does at the
16 beginning of the case when there is no
17 record, there has been no trial, that
18 analysis may look very different. But
19 when we're talking about what is
20 reasonably necessary on federal habeas
21 review, that will necessarily account
22 for habeas limitations that have been
23 placed on AEDPA --

24 JUSTICE GINSBURG: May -- may I
25 ask you before your time runs out, I

1 wasn't clear about your position on
2 prejudice. It seems at one point you
3 were making the point that this murder
4 was so brutal, no amount of mitigating
5 evidence would have helped.

6 MR. KELLER: Mr. --

7 JUSTICE GINSBURG: Are you still
8 making that?

9 MR. KELLER: Mr. Chief Justice,
10 I see my time has expired. If I may
11 answer?

12 CHIEF JUSTICE ROBERTS: Yes.

13 MR. KELLER: Justice Ginsburg,
14 we are still arguing that there was no
15 prejudice. And it's not only the
16 brutality of the crime.

17 There was a robbery at gunpoint
18 three days later with a threat to kill
19 the victim's family. There was an
20 admission to wanting to kill
21 accomplices. There was a threat to
22 kill another witness through his
23 confession, and a criminal history that
24 resulted in jail time after violating
25 probation.

1 CHIEF JUSTICE ROBERTS: Thank
2 you, counsel.

3 MR. KELLER: Thank you.

4 CHIEF JUSTICE ROBERTS: Four
5 minutes, Mr. Kovarsky.

6 REBUTTAL ARGUMENT OF
7 LEE B. KOVARSKY ON BEHALF
8 OF THE PETITIONER

9 MR. KOVARSKY: When federal
10 habeas counsel got this case, they
11 looked at the record and they saw that
12 when invested with the momentous
13 responsibility of explaining to a court
14 why the defendant's moral feedback loop
15 was not such that it should impose the
16 death penalty, the sentencing phase,
17 mitigation presentation, lasted two
18 minutes.

19 They also saw that there had
20 been no social history performed. They
21 saw that there had been no mental
22 health expert that had examined the
23 defendant, and that the trial counsel
24 had failed to follow up on red flags.

25 They saw in the state habeas

1 file that state habeas counsel was told
2 by his investigator nine days after he
3 hired her that the first thing he had
4 to do was a mitigation investigation
5 and a social history, and he didn't do
6 that.

7 And we know that there's a there
8 there because there is a diagnosis of
9 schizophrenia in the record. It is
10 inconceivable that a reasonable
11 attorney, having received this file,
12 getting this case, would do anything
13 other than precisely what federal
14 habeas counsel did in this case.

15 And the reasonable attorney
16 standard is the right standard because
17 it is the standard that Congress
18 picked.

19 At the time Congress enacted
20 Section 3599, it knew that courts had
21 spent 20 years defining reasonable
22 necessity, using a reasonable attorney
23 rule.

24 And it's also the desirable rule
25 because it gives effect to the dominant

1 purpose of the statute, which is to
2 promote parity and representation as
3 between those capable of paying for it
4 and those who aren't.

5 And, finally, it's a really good
6 standard because it's workable. It is
7 flexible enough to apply across phases
8 of the capital representation, courts
9 have 50 years of experience in dealing
10 with it, and it's got meaningful
11 limits.

12 Mr. Chief Justice, I yield the
13 rest of my time.

14 CHIEF JUSTICE ROBERTS: Thank
15 you, counsel, the case is submitted.

16 (Whereupon, at 11:03 a.m., the
17 case was submitted.)

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Official - Subject to Final Review

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